No. 75-1167

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES R. MCHALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on three counts of willfully failing to file income tax returns for the years 1968, 1969, and 1970, in violation of 26 U.S.C. 7203. The court of appeals affirmed by order (Pet. App. No. 2, p. 3a). The evidence showed that petitioner, a photographer, had gross income of over $43,000 for 1968, over $42,000 for 1969, and over $27,000 for 1970; he was therefore required to file income tax returns, which he failed to do. The various reasons given by petitioner for his failure to file included negligence (Tr. 19, 53);[1] that he did not feel he had sufficient money to pay the tax due (Tr. 28, 53, 97, 119); that he did not have time to prepare the returns (Tr. 28, 53, 105); and that

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[1]"Tr." refers to the trial transcript.

he did not know he could file returns without paying the tax (Tr. 53, 97). After considering the presentence report and according petitioner his right of allocution, the district court imposed concurrent sentences of one year's imprisonment on each count.

1. Petitioner first argues (Pet. 6-12, 14-19) that the concurrent one-year prison sentences are excessive and deprived him of due process of law. But the fixing of penalties for crimes is a congressional function, and the question of sentencing is within the trial court's discretion so long as the sentence does not exceed the statutory limit. See, *e.g.*, *United States* v. *Tucker*, 404 U.S. 443, 447; *Cooper* v. *United States*, 403 F.2d 71, 73 (C.A. 10); *Hayes* v. *United States*, 238 F.2d 318, 322 (C.A. 10), certiorari denied, 353 U.S. 983; *Moore* v. *Aderhold*, 108 F.2d 729, 732 (C.C.A. 10); *Davidson* v. *United States*, 411 F.2d 75, 77 (C.A. 10) and cases cited therein; *United States* v. *Tobin*, 429 F.2d 1261, 1265 (C.A. 8); *United States* v. *Bernstein*, 417 F.2d 641, 644 (C.A. 2); *Burch* v. *United States*, 359 F.2d 69, 73 (C.A. 8); *United States* v. *Pruitt*, 341 F.2d 700, 703 (C.A. 4); *Miller* v. *Gladden*, 341 F.2d 972, 977 (C.A. 9). If a sentence is within the statutory limits, the federal appellate courts will ordinarily refuse to set it aside unless it constitutes a cruel and unusual punishment. See, *e.g.*, *Hayes* v. *United States*, *supra*, 238 F.2d at 322; *Moore* v. *Aderhold*, *supra*, 108 F.2d at 732.

Thus, for example, in *United States* v. *MacLeod*, 436 F.2d 947, 951 (C.A. 8), certiorari denied, 402 U.S. 907, the defendant was convicted of three counts of willfully failing to file returns, the same offense of which petitioner was convicted. Although MacLeod's gross income was less than that of petitioner, he was given a more severe sentence — a one-year term of imprisonment, a fine of $10,000 and five years' probation. Nevertheless, his sentence was upheld on appeal because it was held not to constitute cruel and unusual punishment. There was

nothing improper about petitioner's sentence. While he could have received three consecutive one-year sentences and $30,000 in fines, the court imposed only concurrent one-year sentences and no fine.

2. Petitioner further contends (Pet. 12-13) that the district court erred in denying his motion for a change of venue. It is settled, however, that where the crime charged is the failure to do a legally required act, the place fixed for its performance determines where venue properly lies. *Johnston* v. *United States*, 351 U.S. 215; *United States* v. *Daniels*, 429 F.2d 1273 (C.A. 6). Here, petitioner was required to file his returns either with the District Director of Internal Revenue at Louisville, in the Western District of Kentucky, or with the Director of the Internal Revenue Service Center at Covington, in the Eastern District of Kentucky. 26 U.S.C. 6091(b)(1). Thus, venue lay in either of the two judicial districts, with the option given to petitioner to have venue transferred to the district of his residence. 18 U.S.C. 3237(b); H.R. Rep. No. 1915, 89th Cong., 2d Sess. 5 (1966); S. Rep. No. 1625, 89th Cong., 2d Sess. 5 (1966). Since the prosecution was brought in the district of petitioner's residence, the district court correctly denied his motion to change venue to the Western District of Kentucky.[2]

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[2]There is no basis for petitioner's claim (Pet. 14, *et seq.*) that the district court erred in denying his motion for reduction of sentence without granting him a hearing. It is settled that such motions (see Rule 35, Fed. R. Crim. P.) are addressed to the sound discretion of the district court. Thus, that court was not required to grant a hearing. *United States* v. *Jones*, 490 F.2d 207 (C.A. 6), certiorari denied, 416 U.S. 989; *United States* v. *Maynard*, 485 F.2d 247, 248 (C.A. 9).

3. Finally, petitioner contends (Pet. 19-24) that the jury was improperly instructed on the issue of his state of mind and that the trial court failed to draw the necessary distinctions between insanity and the "mere absence of the 'willfulness' element" (Pet. 21). But petitioner did not object to this instruction (Pet. 20) either at trial or in the court of appeals, and there are no exceptional circumstances to warrant consideration of the point by this Court in the first instance. See Fed. R. Crim. P. 30; *Duignan* v. *United States*, 274 U.S. 195, 200; *Husty* v. *United States*, 282 U.S. 694, 701-702; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

At all events, petitioner's psychiatrist testified at trial that petitioner "show[ed] an obsessive, compulsive personality, that he show[ed] poor judgment, that he [was] inclined to mood swings, often with depression" and that this amounted to mental illness (Pet. 19); he further stated that in his opinion petitioner had "no willful intent to cheat the government or to defraud anyone" (Pet. 20). The trial court's instruction, to which petitioner now takes issue, was as follows (Tr. 159):

> [I]f you believe that he was in such a mental state on these three different occasions, three different times, that he was incapable of intentionally and willfully and knowingly evading the law, then, of course, you should find him not guilty.

Contrary to petitioner's contention (Pet. 20), the instruction was not "tantamount to the requirement for a defense of insanity." The court clearly told the jury that petitioner was not claiming insanity (Tr. 158). In fact, the instruction was overgenerous to petitioner. For the misdemeanor of failing to file tax returns, the concept of willfulness entails no purpose or motive other than knowingly to evade the law's filing requirements.

United States v. *Bishop*, 412 U.S. 346; *United States* v. *Haseltine*, 419 F.2d 579, 581 (C.A. 9). Since petitioner did not raise an insanity defense, he could be found to have "the capacity to act willfully. The question is whether he did in fact so act." *United States* v. *Haseltine*, *supra*, 419 F.2d at 581. The fact that failure to file was associated with psychological pressures does not exclude a clear, sane and conscious purpose not to file unless those pressures rendered petitioner incapable of intentionally evading the filing requirements. The trial court's instructions therefore fully conformed to the applicable standard. *United States* v. *Fahey*, 411 F.2d 1213 (C.A. 9), certiorari denied, 396 U.S. 957; *United States* v. *Hazeltine*, *supra*, 419 F.2d at 581.[3]

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[3]The district court's instructions in this case do not implicate the question presented in *United States* v. *Pomponio*, 528 F.2d 247 (C.A. 4), in which the Solicitor General has authorized the filing of a petition for a writ of certiorari. The question presented in *Pomponio* is whether a conviction under the various criminal tax statutes that employ the term "willfully" (26 U.S.C. 7201-7207) requires a finding that the taxpayer had a "bad purpose" or "evil motive," as the court of appeals held, or whether it is sufficient under this Court's decision in *United States* v. *Bishop*, 412 U.S. 346, 360, that the taxpayer is found to have committed "a voluntary, intentional violation of a known legal duty." Here, however, the district court's instructions (Tr. 159-161) on the question of willfulness were taken from those set forth in *United States* v. *Rosenfield*, 469 F.2d 598, 600-601, n. 1 (C.A. 3). In this case, the district court charged the jury that "[a] failure to act is willful if voluntary and purposeful and with the specific intent to fail to do what the law requires to be done, that is, with the bad purpose to disobey or disregard the law." The use of the term "bad purpose" meets the standard established by the Fourth Circuit in *Pomponio*.

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